SWEE HOCK CHAN SDN. BHD.

v.

TAN SENG HIN

HIGH COURT MALAYA, PENANG
GUNN CHIT TUAN J
[CIVIL REVISION NO. 1/83]
15 AUGUST 1983

CONTRACT: *Breach of contract - Claim for refund of deposit and for damages - Defendant not a party to contract - Whether defendant personally liable - Contract signed by defendant, not owner.*

CIVIL PROCEDURE: *Default judgment against person not party to contract - Application to set aside - Application out of time - Whether revisionary and supervisory powers of High Court exercisable.*

AGENCY: *Contract signed by person not party to contract - Whether agent - Whether agent personally liable.*

The plaintiff sued the defendant for breach of a contract which was signed by the defendant, for refund of deposit and for damages. Judgment in default was allowed to be entered against the defendant for the deposit claimed and the hearing adjourned for assessment of damages. At the adjourned hearing the Magistrate, on discovering that the defendant had not been a party to the contract but had signed the contract on behalf of the owner of the land concerned, disallowed the plaintiff's claim for damages. She sent the records of the proceeding to the High Court for consideration as to whether it was a case in which the High Court should exercise its revisionary powers under s. 33 of the Courts of Judicature Act 1964. The defendant applied under O. 28 r. 8 Subordinate Courts Rules 1980 to set aside the default judgment but was out of time.

Held:

[1] The defendant had signed the agreement as an agent of the owner.

[2] The defendant was not personally liable. He had not contracted in his own name and in such form as to make himself personally liable. (s. 183, Contracts Act 1950 applied).

[3] In the circumstances of the case, the Court should exercise its revisionary powers under s. 33 of the Courts of Judicature Act 1964, and set aside the order of the Magistrate.

Cases referred to:
Tay Choon & Ors. v. Jeet Kaur [1972] 1 MLJ 216
Abdul Karim Basma v. Weekes & Ors. [1950] 2 All ER 146

Legislation referred to:
Contracts Act 1950, ss. 183, 186
Courts of Judicature Act 1964 s. 33
Subordinate Courts Rules 1980, O. 28 r. 8

For the plaintiff - N. Shanmugam; M/s. Shan & Gooi
For the defendant - Tan Beng Hong; M/s. Tan Beng Hong

JUDGMENT

Gunn Chit Tuan J:

The original records of Penang 1st Magistrate's Court Civil Suit No. 268/82 were sent to me by the learned Magistrate for consideration as to whether it was a case in which the High Court should exercise its revisionary powers under s. 33 of the Courts of Judicature Act 1964.

In that case the plaintiff company sued the defendant for breach of an agreement allegedly entered into by them wherein the defendant was to allow the plaintiff company to prospect for slag and sand on a certain piece of land. A deposit of RM2,000 was paid in consequence of that agreement. The plaintiff company averred in its statement of claim that in breach of the said agreement the defendant disallowed it to prospect on the said land as a result of which it had suffered loss of at least RM5,000. The plaintiff company therefore claimed a refund of the deposit of RM2,000 and damages in the sum of RM5,000 together with interest and costs.

The suit was fixed for hearing on 3 July 1982 and on that day the learned Magistrate in the absence of the defendant although he had been served with the summons allowed the plaintiff company to enter judgment in default in respect of the said sum of RM2,000 and adjourned the case to 17 July 1982 for assessment of damages.

On 17 July 1982 when learned Counsel for the plaintiff company Mr. Shanmugam led evidence for the assessment of damages, the learned Magistrate had the opportunity to peruse the said agreement. She then discovered that the said agreement was entered into between one Madam Soon Chike Yoke, who is the owner of the said piece of land, as one party and the plaintiff company as the other. The learned Magistrate also noticed that the said agreement was signed by the defendant on behalf of Madam Soon Chike Yoke, but there was no evidence that he was so empowered to sign for her. Although the defendant was a signatory to the said agreement he was apparently not one of the parties to it. The learned Magistrate therefore disallowed the plaintiff's claim for damages and pointed out that she should have dismissed the plaintiff company's claim for the return of the said deposit if she had been given the opportunity to peruse the said agreement before allowing the plaintiff company to sign judgment in default on 3 July 1982. The said defendant has filed an application to set aside the default judgment but unfortunately he is out of time, *vide* O. 28 r. 8 of the Subordinate Courts Rules 1980.

Before considering whether the High Court should exercise its powers of revision and supervision I invited Counsel for both parties to appear and address the Court on this case on 15 August 1983. Mr. Tan Beng Hong, who appeared for the defendant, submitted that the learned Magistrate was right in requesting the High Court to exercise its revisionary powers under s. 33 of the Courts of Judicature Act 1964, because there have been certain irregularities in the Court below. He pointed out that paragraph 3 of the statement of claim was misleading because it alleged that the plaintiff company had entered into the agreement with the defendant, whereas the said agreement showed that one Madam Soon Chike Yoke was in fact described as the owner of the said land and the defendant was merely someone signing on behalf of the said Madam Soon Chike Yoke. It was Counsel's contention that the said Madam Soon Chike Yoke should have been joined as a party to the action and that the plaintiff company had no cause of action against the defendant on the said agreement.

Counsel also agreed that the learned Magistrate was right to point out that the application to set aside the default judgment was out of time because of O. 28 r. 8 of the Subordinate Courts Rules 1980; but he submitted that the defendant could not have applied earlier because he was, according to the affidavits affirmed by him on 26 January, 1983, and 14 May, 1983, never personally served with a copy of the plaintiff company's summons in the said Magistrate's Court civil suit. He therefore prayed that the default judgment be set aside with costs by the High Court as in the case of *Tay Choon & Ors. v. Jeet Kaur* [1972] 1 MLJ 216.

Mr. Shanmugam, the plaintiff company's Counsel, referred to s. 186 of the Contracts Act 1950, which provides that "In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable". He also cited *Abdul Karim Basma v. Weekes & Ors.* [1950] 2 All ER 146, 150 in which Lord Reid referred to the judgment of Parke, B. in *Higgins v. Senior* [1841] 8 M & W 834, 844 wherein the latter had in turn referred to the judgment of Lord Denman in *Jones v. Littledale* [1837] 6 Ad. & E1 486, 490 laying down the general proposition:

> that if the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principal were or were not known at the time of the contract, relieve himself from that responsibility.

The Privy Council in *Abdul Karim Basma v. Weekes* held, *inter alia*, that an agent, who contracted in his own name, did not cease to be contractually bound because it was proved that the other party knew, when the contract was made, that he was acting as agent. Counsel has however apparently over-looked the provisions of s. 183 of the Contracts Act 1950, which provides that an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them. In this case, it was clear from the said agreement that the principal, Madam Soon Chike Yoke was a party to it and that the defendant had merely signed on her behalf. In other words it was an agreement in which the defendant as an agent of Madam Soon Chike Yoke had not contracted in his own name and in such a form as to make himself personally liable. In the circumstances of this case, I considered that I should exercise my revisionary powers and therefore set aside the order of the learned Magistrate pronounced on 3 July 1982, and ordered that the plaintiff company's summons against the defendant be struck off with liberty for it to file a fresh summons in the lower Court.

Also found at [1984] 1 CLJ 43